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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 74-204

GEORGE H. ELDRIDGE,

Respondent

v.

CASPAR WEINBERGER,

Secretary of Health,
Education & Welfare,

Petitioner

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BRIEF OF AMICUS CURIAE CAROLINE WILLIAMS

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INTEREST OF AMICUS CURIAE

The interest of Carolina Williams in this case arises from the fact that she is the Respondent in Weinberger v. Williams, No. 74-205, in this Court, in which Secretary Weinberger has filed his petition for certiorari to the United States Court of Appeals for the Fifth Circuit. The Williams case raises the same issue presented in this case, i.e. whether Social Security beneficiaries must be afforded the opportunity for an evidentiary hearing prior to termination of disability benefits pursuant to §223 of the Social Security Act. Caroline Williams has also participated as amicus curiae in the Eldridge litigation before the United States Court of Appeals for the Fourth Circuit.

PRELIMINARY STATEMENT

Amicus curiae does not dispute any of the preliminary matters in Appellant's brief, including its statement of facts.

SUMMARY OF ARGUMENT

The due process clause of the Fifth Amendment, when all factors are weighed in the balance, requires an opportunity for oral evidentiary hearing prior to termination of Social Security disability benefits when there is a dispute over cessation of disability. These benefits are a terribly important source of income for recipients, and under the current system, benefits are lost for an unconscionably long period of time pending decision after evidentiary hearing. The risk of error absent a prior evidentiary hearing justifies a requirement that just such a hearing be provided. Finally,

no governmental interest outweighs the recipient interest in prior evidentiary hearings.

I. SOCIAL SECURITY DISABILITY BENEFITS ARE A VITALLY IMPORTANT INTEREST FOR RECIPIENTS OF THOSE BENEFITS.

Amicus believes that the instant case is controlled by Goldberg v. Kelly, 397 U.S. 254 (1970), which required the opportunity for an oral evidentiary hearing prior to termination of public assistance (welfare) benefits. Appellant attempts to distinguish the instant case from Goldberg on the ground that the welfare benefits there involved were the recipient's last resort source of income, while Social Security benefits are given regardless of need (Br. at 38).

By way of response, it is first worth noting that this Court since Goldberg has extended due process protections,

including the requirement of a prior oral hearing, to many rights and benefits which do not amount to necessities. See e.g., Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971). In Bell v. Burson, in fact, the Court specifically rejected the argument that only deprivation of necessities gives rise to the need for procedural due process guarantees. 402 U.S. at 539.

Moreover, in striking the due process balance, the Court should be mindful that Social Security benefit payments are in fact the mainstay of millions of family budgets. Despite the assertion of the Secretary's attorneys that Social Security beneficiaries would not be needy without their checks, the Secretary's own procedural manual states precisely to the contrary. The very first sentence of that Manual, reprinted in Appendix "C" to the Secretary's Petition for Certiorari, states:

> Most people who get a social security check depend on it for the necessities of life.

Eldridge Petition at 20A. Thus, this case is virtually indistinguishable from Goldberg as to the recipient interest to be protected.[1]

Finally, one very important consideration in weighing the recipient's interest in prior evidentiary hearings is the length of time it takes after termination to obtain a hearing decision to correct any error. As

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[1] Even though Social Security disability benefits are not the program of last resort in that they are not based on need, denial of Social Security benefits may be tantamount to denial of benefits based on need also. On January 1, 1974, the federal government began a program called Supplemental Security Income (SSI) which superseded the old state welfare programs for adults, including the program of aid for the disabled. 42 U.S.C. §§1381-1383. The disability test for SSI requires that an individual be "unable to engage in any substantial gainful activity," 42 U.S.C. §1382c(A)(3), precisely the same test used in the Social Security program. 42 U.S.C. §416(i). Thus, a finding of nondisability for Social Security (OASDI) purposes is also a finding of nondisability for SSI purposes, and precludes the payment of benefits based on need also.

this Court stated in the recent case of Fusari v. Steinberg, _____ U.S. _____, 42 L. Ed. 2d 521 (1975):

> Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action ...[T]he possible length of wrongful deprivation of .., benefits is an important factor in assessing the impact of official action on the private interests ... [T]he rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process.

42 L. Ed. 2d at 529. In the case at bar, the Secretary has provided the Court with stunning and hitherto unavailable statistics on the current lag between hearing request and hearing decision. In his brief, at pages 30 and 51, the Secretary admits that this delay now amounts to between ten and eleven months.[2] During that entire period, the

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[2] Even this figure does not take into account the further delay to allow the Appeals Council to determine whether or not to review the hearing decision on its own motion, and the mechanical process of getting out the first renewed check. In summary, it appears likely that the termination of benefits pending a hearing decision currently results in the delay of at least a year in payment of benefits.

recipient who is wrongfully terminated will have to suffer without his income substitute from Social Security until a reversal after hearing can be effected.

Amicus concludes that the recipient's interest in his Social Security disability benefits, especially in view of the length of deprivation before hearing decision, is of very heavy weight in the due process balance.

II. THE SIGNIFICANT RISK OF ERROR ABSENT SUCH PROCEDURES JUSTIFIES THE REQUIREMENT OF OPPORTUNITY FOR A PRIOR EVIDENTIARY HEARING.

The Secretary contends that the risk of error in his "paper hearing" scheme is minimal, and that the opportunity for a prior evidentiary hearing is therefore not required as a matter of due process. The Secretary attempts to mask the importance of the evidentiary hearing by pointing out that only 15% of all initial determinations of

cessation of disability are reversed, and that most of those reversals occur at the state of reconsideration, or "paper hearing." (Br. at 32, 43).

The most important statistic for purposes of this case is found on page 31 of the Secretary's brief. There the Secretary reports that of those who requested reconsideration of the issue of their disability, were denied, and requested a hearing, fully 40-50% obtained reversals of the initial finding of nondisability. This substantial risk of error compels the conclusion that the prior evidentiary hearing is such an important procedural

protection as to be a required part of due process.[3]

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[3] The Secretary's point in using his statistics appears to be that the reconsideration stage as currently structured is sufficient to catch most initial errors in cessation determinations. His argument has a further and unarticulated step, namely that in view of the gross statistics on the success of the paper reconsideration stage, a requirement or oral hearing opportunity for all recipients threatened with termination is unwarranted. Amicus would not suggest that the Secretary must necessarily abolish the paper reconsideration stage and extend the hearing requirement to all cases. An effective alternative, consonant with due process, and probably cheaper, would be to keep the present paper reconsideration stage and offer the opportunity for prior evidentiary hearing to recipients still threatened with termination after this stage. See also Part III, infra.

The Secretary also attempts to minimize the importance of the risk of error by arguing that this case is distinguishable from Goldberg as to the importance of oral hearing to the recipient. The Secretary contends, first, that disability decisions are merely a matter of written "medical" evidence, and that such written reports are largely reliable (Br. at 40-41); and second, that Social Security recipients are better able than are welfare recipients to cope with the demands of a written submission system. (Br. at 40-41). Amicus would suggest that the 40-50% reversal rate after oral hearing is enough to suggest the error of these contentions. But she will also show that each of these arguments taken separately is wide of the mark.

A. The Nature of Disability Issues Requires Opportunity for Oral Evidentiary Hearing.

Even if it were true that all disability

determinations were predicated upon a cessation of disability alone,[4] it would not follow that the issues could be decided solely on the basis of written submissions. Cf. Morrissey v. Brewer, 408 U.S. 471 (1972).

The Secretary cites this Court's opinion in Richardson v. Perales, 402 U.S. 389 (1971) for the proposition that written doctor's reports are inherently reliable. The Secretary's analysis of Perales is correct as far as it goes, but it falls short of a complete analysis of that case. Perales merely held that

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4 The regulations also provide for termination for failure to cooperate, without good cause, where disability is in issue. 20 C.F.R. §404.1539(c). This standard creates factual issues precisely parallel to those raised by the termination of one of the welfare recipients in Goldberg.

physicians' reports have enough reliability that they may be admitted into evidence and may serve as substantial evidence to support a decision adverse to the claimant. Perales falls several steps short of the argument that the Secretary makes, however. Perales does not stand for the proposition that a written report is an adequate substitute for oral testimony where the claimant feels the need to subpoena and cross-examine a doctor.[5] Nor does Perales exclude the possibility of valuable oral testimony in addition to the written doctor's reports, testimony which in combination with the written medical evidence may establish disability.

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5 In fact, Perales specifically notes that the claimant has the right under 20 C.F.R. §404.926 to subpoena physicians to hearing if he so desires. 20 U.S. at 404, 407. Perales also specifically reserves the issue here presented 402 U.S. at 407.

Several recent cases have established exactly this second proposition, that oral testimony by the claimant and other lay witnesses may greatly supplement the dry medical reports and add the personal insight which establishes disability. This testimony may cover such important items in the disability equation as the claimant's subjective symptons, his endurance, and his ability to engage in day-to-day activities. A typical statement of the importance of this evidence is found in DePaepe v. Richardson, 464 F. 2d 92 (5th Cir. 1972):

> [T]here are four elements of proof to be considered in determining whether a claimant is disabled within the meaning of the Social Security Act, and these are: (1) objective medical facts or clinical findings; (2) diagnoses of examining physicians; (3) subjective evidence of pain and disability as testified to my members of his family, his neighbors and others who have observed him; and (4) the claimant's age, education and work history .... It is obvious that all of these elements of proof must be considered together and in combination with each other, and not just one or two with the others excluded.

Id. at 94. [Emphasis in original]. Lay testimony in particular is a vital consideration in the determination and should not be disregarded. Id. at 99-100. Accord, Underwood v. Ribicoff, 298 F. 2d 850 (4th Cir. 1962). Other Circuits have apparently placed even more reliance on subjective testimony. See e.g., Bittel v. Richardson, 441 F. 2d 1193 (3rd Cir. 1971).

The vital role of subjective testimony in disability determinations serves to underscore the importance of oral hearings. The administrative law judge performs two important functions in the hearing decision process which are not served by reliance

on written reports alone: first, he "eyeballs" the claimant and other witnesses, and makes a first-hand judgment as to their veracity and the credibility of their statements as to the claimant's impairment and residual capacities; second, he weighs the impressions he has gained from this testimony against the objective medical evidence of record to get a holistic picture of the claimant's functional abilities.

The salutary effect for claimants of an oral hearing on the disability termination issue is illustrated by the remarkable figures showing a high percentage of reversals after hearing, as discussed above. Opportunity for such a hearing is a vital opportunity for recipients to complete the record on the issue of disability.

B. Oral Hearing is a Vital Procedural Safeguard for Disability Recipients.

Petitioner also contends that this case is distinguishable from Goldberg in that Social Security recipients are more capable than are welfare recipients of expressing themselves in written submissions. This contention is inconsistent with the very definition of disability. Since the disabled are those who are unable to adjust to their physical and emotional problems in the light of their "age, education and work experience," 42 U.S.C. §423(d)(2)(A), this group includes a disproportionate number of the uneducated, unlettered and incompetent who are illequipped to cope with the demands of a written and highly verbal system. For this group, the words of Goldberg sound ringingly true:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decisionmaker in writing or second hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important.

397 U.S. at 268-69. Like welfare recipients, Social Security disability beneficiaries need the opportunity for a prompt oral hearing in order to present their case with full effectiveness.

The figures quoted by the Secretary at page 42, fn. 46 of his brief, do not undercut this analysis. Even though Social Security recipients undeniably have received a measurable amount of schooling, they are by definition a group that

have been unable to turn their skills to useful work. One of the skills lacking in a high proportion of these individuals is unquestionably the same ability to communicate on paper that was found missing in welfare recipients in Goldberg and in its companion case, Wheeler v. Montgomery, 397 U.S. 280 (1970), where this Court invalidated a paper hearing scheme for welfare recipients.

When the Secretary indicates that reversals after hearing often occur because of the submission of new evidence or because of the application of an informed judgment to the facts (Br. at 12, 43), he is calling attention to two of the very factors that make a prior evidentiary hearing so important. Only in an evidentiary hearing will many recipeints be made fully aware of the kinds of evidence they must submit in order to establish

their disability; and only in such a confrontation situation can the decider make a complete judgment about the unique characteristics of an individual recipient which make him continuingly disabled despite apparent "medical" evidence to the contrary. Amicus concludes that a prior evidentiary hearing is as important an additional protection here as it was to the parolee in Morrissey v. Brewer, 408 U.S. 471 (1972), or the welfare recipients in Goldberg and Montgomery.

III. NO ARGUMENT FROM ADMINISTRATIVE CONVENIENCE JUSTIFIES THE SECRETARY'S FAILURE TO PROVIDE THE OPPORTUNITY FOR PRIOR ORAL HEARING.

The Secretary urges that evidentiary hearings should not be required prior to termination of benefits because of alleged

administrative problems in administering such a program. The whole argument, essentially, boils down to a contention that prior hearings would be too costly to be worthwhile.

First of all, it should be noted that this Court has not yet refused prior evidentiary hearings for reasons of cost alone. In each case in which termination procedures were found sufficient without prior evidentiary hearings, other state interests than money added to the balance. For example, in Goss v. Lopez, ___ U.S. ___, 42 L. Ed. 2d 725 (1975), this Court approved suspensions from school for less than ten days without formal hearing because of the need to remove a disturbing influence quickly and summarily from the school. In Arnett v. Kennedy, 416 U.S. 134 (1974), where the Court might

have relied on similar needs in job situations, the plurality opinion instead held that the procedural rights of a fired federal employee were expressly limited by the rights given him by statute. In Wolff v. McDonnell, ___ U.S. ___, 41 L. Ed. 2d 935 (1974), the Court held rights of confrontation and cross-examination not required in proceedings for the suspension of good time credit, where such procedures might interfere with prison discipline.

In this case, a requirement of a prior oral hearing would not interfere with any other governmental interest, as in the cases above. In fact, the only interest of the government here, apart from the fiscal one, dovetails perfectly with that of the recipient. The government has, after all, an interest in seeing that all eligible recipients are

paid in accord with the purposes of the Social Security program. As this Court struck the balance in Goldberg:

> Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

397 U.S. at 266.

Furthermore, Amicus would suggest that the cost of a prior oral hearing requirement is not as great as the Secretary would suggest. As Amicus has suggested, supra, n. 3, the only aspect of the Secretary's procedure that needs to be changed in order to comply with due process requirements is to defer termination until after hearing decision, rather than terminating immediately after reconsideration, as at present. Since

the hearing and other administrative costs are presumably the same whether the hearing is conducted before or after termination, the only additional cost of the prior hearing requirement is the unrecoupable portion of the benefits paid pending a hearing to that portion of the recipients who turn out to be ineligible after appeal.

Moreover, even these costs are not outside the Secretary's control. Again, as this Court explained with regard to such expenses in Goldberg:

> But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

Id.[6] Thus, even the inevitable cost increase which will result from a prior evidentiary hearing requirement can be kept to a minimum with quick hearings and proper planning.

Given that some costs will increase but that no other interests of the federal

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[6] As the Secretary notes, Br. at 52-53, acceleration of hearings for recipients threatened with termination may have the short-run effect of delaying hearings for some new applicants appealing from denials of initial applications. Although this is obviously not an easy short-run choice, Amicus would suggest that it is a necessary choice because of the expectations built up in recipients by and in continuing receipt of their checks. In the long run, the Secretary will have to do something about the size of his hearing staff. Amicus is frankly appalled that the Secretary intends to cut back on the number of his administrative law judges (Br. at 50, fn. 58) in a period of increasing applications, when the time lag from hearing request to hearing decision is already some ten or eleven months.

government will be infringed upon, the balance to be struck is clear.

> A prior hearing always imposes some cost in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, supra, at 540-541; Goldberg v. Kelly, supra, at 261. Procedural due process is not intended to promote all possible interests, it is intended to protect the particular interests of the person whose possessions are about to be taken.

Fuentes v. Shevin, 407 U.S. 67 at 90 n. 22 (1972).

On an even higher plane, this Court has said;

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the

> Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

In short, protestations of increased cost cannot control this case, and for the reasons stated above, disability recipients should be afforded the opportunity for oral hearing prior to termination.

CONCLUSION

Social Security disability benefits are a budget mainstay for those who receive them. Under current procedures, delay from hearing request to hearing decision is unconscionably long. In 40 to 50 per cent of disability cases

which go to hearing, initial decisions against the recipient are reversed. The evidentiary hearing is important to the recipient because of the opportunities it gives to the administrative law judge to consider subjective evidence, and to the recipient to tailor his argument to the administrative law judge's concerns. Finally, no other administrative problems other than cost mitigate against a prior oral hearing requirement here; neither cost in general nor the specific costs of evidentiary hearing in this context are sufficient to out-weigh the need of recipients of disability benefits for prior hearing.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with air mail postage prepaid, and addressed to:

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This the ____ day of _____,
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